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No. 84-235

In the Supreme Court of the United States

OCTOBER TERM, 1984

SHOWCASE CINEMAS CONCESSIONS
OF DEDHAM, INC., ET AL.,
PETITIONERS,

v.

JOHN SILVA, ET AL.,
RESPONDENTS.

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the First Circuit**

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should This Court Consider an Alleged Freedom of Speech Violation When the First Amendment Was Neither an Issue nor the Basis for Defendant's Liability in the Court Below?

II. Should This Court Consider Defendant's Contention That Adverse Factual Findings Violated the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

III. Should This Court Review the Denial of the Defendant's Motion for New Trial?

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The Petition for a Writ of Certiorari (hereinafter "Petition;; or "Pet.") should be denied. The respondents concur with and incorporate the petitioner's statements under the headings: Opinions Below, Jurisdiction, and the Rules of Civil Procedure Involved in the Petition of the appellant (hereinafter "Pet. App.").

Statement of the Case

Defendant, National Amusements, Inc., is the operator of a theater complex in Seekonk, Massachusetts. Plaintiffs' intestate, John Silva, Jr., together with his brother and two friends attended a movie which was being shown in one of the

theaters located in the complex. The movie "Quadrophenia" featured rock music by The Who and depicted violence between two youth groups in England. Also in attendance at the movie on December 25th, was another group of four youths. This second group, which included the decedent's assailant, was boisterous and obnoxious throughout the entire movie. On more than one occasion other patrons asked this group to quiet down. Words were exchanged between the two groups. All of the patrons who testified stated that no theater personnel were seen in the theater either prior to or during the movie. The theater's manager maintained that he had entered that theater at least twice, but his testimony had previously been severely impeached when he did not recall an earlier documented incident in which a patron had put a knife to his throat. As the movie ended, one member of the assailant's group gestured toward the group which included the petitioner's decedent. Both groups exited through the front exit and at the door a shoving match started which culminated in the fatal stabbing of John Silva, Jr. No usher was posted at that exit despite the fact that the petitioner ordinarily posted ushers at exit doors.

Criminal activity was not uncommon at the petitioner's theater complex. In addition to more than one hundred and fifty (150) property crimes in the preceding two years, there had been a kidnapping and two robberies. On one occasion the petitioner's theater manager was assaulted at knifepoint. Crime in the parking lot of the Showcase Cinema was serious enough to warrant the posting of police officers on the theater's roof. On at least one prior occasion, police officers were stationed inside the theater during the showing of a movie which featured violence to avoid potential rowdiness.

After presentation of plaintiffs' case, the defendant moved for a directed verdict which was denied. (Ruling of trial judge at Pet. App. A-7.) In that opinion, the trial judge stated:

> "the issue is was there sufficient notice on the part of the theater owner to have him realize that he was operating

an establishment that was a potential of trouble." (Pet. App. A-16).

"Now certainly in all God-given common sense, any manager who is worth his salt should have known what was going on in the parking lot of this theater. Should have realized from the fact that he himself had been confronted with a knife at his throat by, as he put it, "a motorcycle gang," should have known from the fact that one of his own ushers was robbed. That there was something amiss in that area and precaution should have been taken to safeguard the patrons. (Pet. App. A-10).

"What could be more dramatic than to have a man in the lobby of this theater be assaulted by a person who, as he termed, was a member of a motorcycle gang and obviously threatened to cut his throat. Says, "don't hassle me". What could be more dramatic than to have the very usher of your cadre of ushers robbed in the very theater he's supposed to be taking care of? What could be more significant than in this theater a group of boys who are rowdy, noisy, as some witness put it, obnoxious and no one there even to begin to try to calm the potential of danger that was posed. And I do resay, and I don't want to be accused of narrow-mindedness, but from the way one of the witnesses described the appearance of these people, they must have been a wild looking group of individuals." (Pet. App. A-17)

At the close of all the evidence, defendant again moved for a directed verdict which was denied as the facts made out a jury question. After verdict defendant filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. This motion was also denied by the District Court.

The Court of Appeals upheld the District Court's denial of a directed verdict on the basis that:

> "the jury could find from the film, the audience and the circumstances that violence was in the air, that the theater did not take reasonable steps to prevent it, and that this failure foreseeably led to tragedy." (Pet. App. A-4).

The Court of Appeals also found that the record adequately supported the denial of the new trial motion.

Defendant then filed a petition for rehearing which the Court of Appeals also denied.

Reasons for Denying the Writ

I. THE ISSUE PRESENTED WAS NOT RAISED OR PRESERVED IN THE COURT BELOW. THE COURT BELOW FULLY AND CORRECTLY DECIDED THE ISSUES.

A. *The issue presented was not raised or preserved in the court below.*

Defendant admits that no First Amendment issue was raised or preserved in the court below. (Pet. at 5). This is fatal. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

B. *The Court below fully and correctly decided the issue.*

The Court below did not impose liability on the basis of the content of the film which was being shown. The court below found the film being shown was a factor to be considered in judging the reasonableness of the defendant's conduct. A trier of fact could reasonably determine that different security precautions might be necessary depending on the film being depicted and the size and type of audience the film could be expected to attract.

II. Only Questions of Evidence and Factual Findings Are Involved. The Court Below Fully and Correctly Decided the Issue.

A. *Only questions of evidence and factual findings are involved.*

Defendant's second issue alleges the Court of Appeals found facts not supported by the record and drew impermissible inferences therefrom. This Court should not grant Certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175 (1938).

B. *The Court below fully and correctly decided the issue.*

The decision below was fully supported by the record and only permissible inferences were drawn therefrom. Defendant's argument that the evidence was uncontradicted regarding ushers in the theater is fallacious. Patrons testified that no employee of the petitioner was seen inside the theater. From this testimony, a logical inference might be drawn that ushers were not seen because they were not there. While there was testimony to the contrary from the theater manager, a jury could have chosen to not believe him particularly where his credibility had been severely impeached. Even if ushers were present, the facts made out a jury question.

III. THIS COURT SHOULD NOT REVIEW THE DENIAL OF DEFENDANT'S MOTION FOR A NEW TRIAL. THE DECISION BELOW TURNS ON ITS OWN FACTS AND WILL AFFECT FEW OTHER THAN THE LITIGANTS. THE COURT BELOW FULLY AND CORRECTLY DECIDED THE ISSUE.

A. *Few other than the litigants will be affected.*

Certiorari is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties. *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). No one other than the litigants herein can be affected by the denial of a new trial.

B. *The Court below fully and correctly decided the issue.*

Rule 59 does not require the trial judge to set forth findings and reasons when denying a motion for a new trial. Only when the court grants a new trial on its own initiative pursuant to Rule 59(d) must the court specify the grounds therefor. Defendant asks this Court for a third review of the trial record. Fact canvassing is not a task to be served by certiorari. *United States* v. *Johnson*, 268 U.S. 220, 227 (1925).

Conclusion

For all of these reasons, this Court should not issue its Writ of Certiorari to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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